No. 14797

es Court of Appeals
the Ninth Circuit

NELL, *Plaintiff-Appellee,*

vs.

N, also known as E. R. ERRION and
ERRION, VIOLET KELLERSTRAUS, and
N, *Defendants-Appellants,*

OPAL HOLDORF, HOLDORF OYSTER
ashington Corporation, INAR GLAS-
ER, KATHERINE GOLD, H. A. DAVEN-
as LEE DAVENPORT, CORA SCOTT,
Defendants.

UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT

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B ERRION, AMY ERRI-
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as LEE DAVENPORT,
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UNITED STATES DISTRICT COURT
DISTRICT OF WASHINGTON
RTHERN DIVISION

Appellee's Statement of the Case

Sixteen pages of appellee's brief consists of her statement of the case. With only one or two exceptions, all citations to the record refer to testimony of Dwight Holdorf, Marguerite L. Connell, appellee, or merely refer to the findings entered by the trial court.

In our opening brief we pointed out that the testimony of both Dwight Holdorf and appellee was substantially impeached and hence was not of a character sufficient to support a fraud judgment. This has been almost completely ignored by appellee in her brief.

We are even less impressed with the numerous references to th findings of the trial court. More than one-third of all record citations in appellee's brief are merely to the findings of the trial court. The question before the Court respecting the findings is whether or not the evidence supports such findings. It is of no help to cite the findings themselves, and it is appellants' position that there is no evidence to support a very considerable number of the findings of the trial court. We will treat this matter more specifically in discussing the several portions of appellee's brief.

Amount and Number of Securities Involved in Single or Separate Transactions

In this portion of her brief appellee seeks to lump together all of her properties and to indicate that there was but one single transactions between appellee and the other parties, including appellants.

As pointed out at page 19 of appellant's opening brief, there was only one transaction with appellant, Errion, as to which no fraud whatsoever is alleged or

of the remaining transactions were
rf, acting for the Holdorf Oyster
is correct, it is of no importance
involved in the second transaction,
l the authorities cited by appellee
her brief do not support her con-

Co., etc., v. United States (D.Ct.
. 1019, and *Trenton Cotton Oil Co.*
) 147 F.(2d) 33, are nowise in point.
case held that the particular items
re not securities. Neither case in-
of the Securities Exchange Act.

ses cited on page 18 of appellee's
an investment contract or invest-
d there can be no analogy whatso-
nstruments and any of the instru-

The case of *Joy v. Pagel* (Mich. 1939) 283 N.W. 646, cited by appellee at page 19 of her brief, simply held that where the purchase of treasury stock from a corporation was induced by the promise to take it off the purchaser's hands at a stated price on or before a certain date, there was but a single contract.

At page 20 of her brief, appellee states that Errion's note (Exhibit A-3) was a security. Appellee neglects to state, however, that it is undisputed that this note was transferred by appellee to Dwight Holdorf.

Jurisdiction by Reason of the Securities Exchange Act and Rule X-10b-5

The first sentence of this sub-division of appellee's brief, appearing at page 20 is apparently intended to be facetious. The humor is not appreciated. The record clearly indicates that from the very inception of this action in the fall of 1953 to the present date, appellants have contended that the District Court lacked jurisdiction in this proceeding.

We have no quarrel with the authorities cited by appellee at pages 22 and 23 of her brief upon their particular facts. The first group, commencing with *Fratt v. Robinson* (9 Cir. 1953) 203 F.(2d) 627, and ending with *Mills v. Sarjem Corp.* (District Court June, 1955) 133 F. Supp. 753, merely affirm the rule that a civil action may be brought. Each involved either corporate securities and stock or municipal bonds and in point of fact, the last cited case held that no fraud had been proved. None is authority to uphold the jurisdiction of the District Court in this case. We have previously dealt with the question of jurisdiction in the first por-

t in our opening brief commencing

ot concerned with the question of
any notes and instruments in this
est in the same.

ted on page 24 of appellee's brief,
a motion or demurrer to the plead-
ing whether there was alleged one
action. None is in point.

xpressed statement of appellee at
24 of her brief, appellants have
hat securities and non-securities
gled in this action and none of the
appellee hold to the contrary.

appellee at page 25 and 26 of her
nts the conclusion of counsel in an
within the jurisdiction of the Dis-

brief of the Securities and Exchange Commission which appears on page 26 and 27 of appellee's brief, is inserted solely for any possible influence it might have upon this Court. We have no objection to any position which the Securities and Exchange Commission might take in a proper proceeding. We do not believe its opinion is of value to the Court.

The case of *Birnbaum v. Newport Steel Corp.* (2 Cir. 1952) 193 F.(2d) 461 cited at page 27 of appellee's brief, in point of fact affirmed a judgment dismissing an action since the action involved only fraudulent mismanagement of corporate affairs, and the Court held that was not within the purview of the Securities Exchange Act.

"Pendent" Jurisdiction

This portion of appellee's brief, commencing at page 27, is entirely new and was not raised at any time in the trial court. It is obviously an attempt to bolster the jurisdictional position claimed by appellee.

The leading case on this subject is the case of *Hurn v. Oursler* (1933), 289 U.S. 238, 77 L.Ed. 1148. This case is cited by appellee at page 29 of her brief, and most, if not all, of the remaining coses cited by her under this subdivision are predicated upon the reasoning in the case of *Hurn v. Oursler.* At page 1154 in 77 L.Ed. the Supreme Court states the correct rule as follows:

> "But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause

stinction to be observed is between
o distinct grounds in support of a
ction are alleged, one only of which
al question, and a case where two
stinct causes of action are alleged,
ch is federal in character. In the
he federal question averred is not
; in substance, the federal court,
federal ground be not established,
ss retain and dispose of the case
deral ground; in the latter it may
he non-federal cause of action."

s that in the case at bar appellee's
cting recovery of damages arising
of her several properties, involve
t causes of action. This is vastly
ctual situation in the case of *Hurn*
re was involved claims of infringe-
mpetition resting upon identical

The rule in civil cases is entirely different than that expressed in the cases cited by appellee. This is clearly brought out in the case of *United States v. Grayson* (2 Cir. 1948) 166 F.(2d) 863, which is cited by appellee, and in which case at page 866 of its opinion the Court of Appeals for the Second Circuit expressly points out that a different rule applies in civil cases.

At page 33 of her brief appellee states that jurisdiction is satisfied "if any act or any transaction of the offending fraudulent scheme occurred in the Western District of Washington." That statement is not supported by Section 27 of the Act (15 U.S.C. § 78AA) nor the cited case of *Robinson v. Difford* (D.Ct. Pa. 1950) 92 F.Supp. 145. In point of fact both the act and the *Robinson* case require that "any act or transaction constituting the violation" must occur within the district. The "violation" obviously relates to violation of the Securities Exchange Act, itself.

At pages 33 and 34 of her brief appellee seeks to set forth a number of instances occurring within the jurisdiction of the trial court. Many are incorrect. There is no evidence that "most, if not all, of the fraudulent statements attributed to Errion were made in appellee's home." There is a complete lack of evidence that the transaction involving the corporate stock and the promissory note (Exhibit A-3) occurred in Seattle. The only evidence as to any typing done by appellant, Amy Errion, was the very unsatisfactory evidence of appellee. The evidence as to the presentation of the receipt (Exhibit A-5) was from Holdorf. There is no evidence to support the statement that the deed to the tidelands was delivered to Mrs. Connell in her home,

l in Seattle for Olson to sell the Bo-
the Rankin contract. It is true that
erty was sold in Seattle and de-
orf's bank account in Vancouver.
Corporation is a Washington cor-
timony concerning that came sole-

ppellee's case to refer to the "loot"
5 of her brief.

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ent relative to the statute of limi-
been covered in our opening brief.
t out that all of the testimony re-
e under this portion of her brief,
wn testimony or merely is a refer-
f the Court.

it is worthy of note that appellee,

repeated statement in appellee's brief that the visit in California in 1950 had any ulterior purpose whatsoever, and, of course, particularly, that appellant, Amy Errion, had the slightest connection with any ulterior purpose. Finding No. XXI of the Court (R. 123-Vol. II) has no support whatsoever in the evidence.

The Court's attention is especially commended to the case of *Johnston v. Spokane & Inland Empire R. Co.,* 104 Wash. 562, 177 Pac. 810. Appellee quotes from that case at page 38 of her brief. The decision, however, affirmed a judgment dismissing the action by reason of the statute of limitations, and in many respects the case is at all fours with the case at bar. Among other things, the Court said:

> "We have always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein. *Sherman v. Sweeny,* 29 Wash. 321, 69 Pac. 1117; *Hubenthal v. Spokane & Inland R. Co.,* 43 Wash. 677, 86 Pac. 955; *Golle v. State Bank of Wilson Creek,* 52 Wash. 437, 100 Pac. 984. And that,
>
> " 'Whatever is notice enough to excite attention and put the party on guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' . . . 'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.' *Deering v. Holcomb,* 26 Wash. 588, 67 Pac. 240, 561.

rauded must be diligent in making
eans of knowledge are equivalent
clue to the fact which, if followed
would lead to discovery, is in law
discovery. *Norris v. Haggin,* 28
v. Holbrook, 32 Wash. 349, 73 Pac.
alland, 53 Wash. 504, 102 Pac. 440;
ulcahy, 78 Wash. 9, 138 Pac. 314.

eking to rescind for fraud or false
must do so within a reasonable
ght is lost by failure to act promptly
the fraud, or after it might have
by the use of due diligence.' 13

brief appellee quotes from the case
o M. & St. P. Railway Co. (District
n, 1915) 224 Fed. 196. We believe
pful to the Court to quote the entire
ch appellee has taken the language
ef. That paragraph is as follows:

signed a release a year prior to the expiration of the period of limitation. The bill shows on its face that immediately after signing the release plaintiff grew worse and began to suffer from the complication of diseases which he refers to in his bill. Plaintiff must be held to his knowledge, and likewise to the exercise of ordinary diligence in the prosecution of his action, and in seeking relief from the conduct complained of; and if he fails to exercise this diligence, equity will not suspend the operation of the statute. The Circuit Court of Appeals of this circuit, in *Newberry v. Wilkinson,* 199 Fed. 673, at page 688, 118 C.C.A. 111, in disposing of the right of a minor who was fraudulently induced to sign away certain property rights, said:

" 'Reasonable attention to an affair peculiarly his own, would have led plaintiff, at least soon after his arrival at age, to the possession of all the knowledge he acquired immediately prior to the bringing of the suit. But he delayed the institution of his suit until the statute of limitations had fully run against him and in favor of the surety. * * * We are of the opinion that, had the suit been seasonably instituted after the plaintiff became of age, the bar of the statute of nonclaim would not have stood in the way of his recovery, and of course, had the suit been brought but a few days earlier, the statute of limitations * * * would not have run at all. We are impelled to the conviction, however, that the delay suffered by plaintiff after he was in possession in possession of information challenging further inquiry on his part, and after he had arrived at legal age, * * * amounts to *laches* on his part, and a court of chancery will not now interpose to remove the bar of either of such statutes of limitation, nor will it afford him the relief prayed.' "

nnroad Corp. (3 Cir. 1944) 146 F.
ge 39 of appellee's brief, the Court
ere must be affirmative independ-
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all v. Anderson, 85 Wash. 369, 148
llee at page 40 of her brief is of no
that case the Supreme Court of the
affirmed the trial court in holding
aud or duress under the particular

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er brief appellee discusses the bur-
lertakes to criticize appellants for
very bit of evidence in support of
of the thirty-six separate findings
wise than we have done, would be
and our opening brief to such a

tached to appellee's brief, to-wit, that she was Errion's wife.

Likewise the evidence as to appellant, Violet Kellerstraus, and appellant, C. W. Williamson, referred to at pages 44 and 45 of appellee's brief, fall far short of the character of evidence required to sustain an action of this nature.

The authorities relied upon by appellee under this portion of her argument are not in point. The two cases from the Court of Appeals cited at page 41, *Norris & Hirschberg, Inc., v. S.E.C.* (D.C. Cir., 1949) 177 F.(2d) 228, and *Charles Hughes & Co. v. S.E.C.* (2 Cir., 1943) 139 F.(2d) 434, each involved the review of an order of the Securities and Exchange Commission revoking the license and registration of a stock broker. Each involved the sale of securities and was limited to the particular facts in the respective cases. Neither involved a civil suit for damages.

The case of *Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane,* 85 F.Supp. 104, also cited at page 41, was a civil suit. The question of the burden of proof, however, was not discussed by the Court.

Upon their facts, the cases cited by appellee at page 42 are utterly dissimilar from the case at bar. *Holmes v. United States* (8 Cir. 1943) 134 F.(2d) 125 was a criminal case to which we have previously referred. *Dellefield v. Blockdel Realty Co.* (2 Cir. 1942) 128 F. (2d) 845, held that to prove fraud one must establish knowledge on the part of the one making statements and an affirmative intent to deceive.

s v. British Mortgage Co. (5 Cir.
3 was an action to rescind a real
was predicated entirely upon the
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r conspiracy by clear, cogent and
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l to which we have referred in our

***cto* with Appellants**

eviously said in our opening brief
is, we believe, a sufficient answer
tions raised by appellee at pages

Motion of Appellant, Violat Kellerstraus, to Quash Service

This matter, also, we believe, has been sufficiently covered in our opening brief.

CONCLUSION

For the reasons expressed in our opening brief, the judgment of the United States District Court for the Western District of Wasbhington, Northern Division, should be reversed.

Respectfully submitted,

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